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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 92CV7223, Courtroom 19

COPY

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, BRET TANBERG, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, and THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER as Governor of the State of Colorado, GALE NORTON as Attorney General of the State of Colorado, and THE STATE OF COLORADO,

Defendants.

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The plaintiffs submit, under C.R.C.P. 65 and 121, § 1-15(1), the following brief in support of their motion to enjoin the defendants as the chief law enforcement officials of the state from enforcing Amendment 2.[1]

I. STATEMENT OF THE CASE[2]

The plaintiffs seek to invalidate Amendment 2 on the ground that it violates fundamental rights embodied in the United States Constitution. Amendment 2 provides:

> Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be self-executing.

If Amendment 2 takes effect, it will deprive all governmental entities in Colorado of the power to remedy "any claim of discrimination" based on "homosexual, lesbian or bisexual orientation."[3] The amendment will deprive individual plaintiffs of

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[1]This brief is also submitted as the plaintiffs' response to part IX of the defendants' brief in support of their motion to dismiss.

[2]The plaintiffs intend to prove the facts included in the statement of the case.

[3]The drafters of Amendment 2 were aware that the phrase "sexual orientation" refers to heterosexuals, gay men, lesbians and bisexuals. The drafters, however, chose the terms "homosexual," "lesbian," and "bisexual" to prevent Amendment 2 from covering heterosexual sexual orientation. See statement of Tony Marco, hearing on ballot title for Amendment 2, Sept. 4, 1991.

their fundamental rights to equal protection and First Amendment freedoms guaranteed by the United States Constitution. The amendment will deprive the branches, departments, agencies and political subdivisions of the state,[4] municipalities, and school districts from enacting, adopting or enforcing a statute, regulation, ordinance or policy that forbids discrimination on the basis of sexual orientation. The amendment will deprive the plaintiff cities of Denver, Boulder and Aspen of the power to enforce their ordinances that prohibit discrimination on the basis of sexual orientation.[5] The amendment will deprive the defendant Governor Roy Romer of the power to enforce his executive order preventing discrimination in state employment[6] and the power to enforce the statute banning sexual orientation discrimination by insurance companies.[7] The amendment will deprive the

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[4]Counties are political subdivisions of the state.

[5]Denver Municipal Code, art. IV, §§ 28-91 through 28-116; see also, Rules and Regulations of Denver Police Department, RR-122, and § 117.01 of Police Department Operations Manual; Boulder Revised Code, §§ 12-1-2 through -4; Aspen Municipal Code, § 13-98. Since Denver's anti-discrimination ordinance became effective on February 1, 1991, forty-one persons have filed complaints alleging discrimination on the basis of sexual orientation in employment, housing, and public accommodations. Since Boulder's anti-discrimination ordinance was approved as a citizen initiative in November 1987, thirteen persons have filed complaints alleging discrimination.

[6]Executive Order, December 10, 1990; see also, policy 11-1 of Code of Colorado Regulations.

[7]Section 10-3-1104, 4A C.R.S. (1992 Supp.).

plaintiff Boulder Valley School District of the ability to enforce its policy protecting students from discrimination on the basis of sexual orientation.

The Secretary of State canvassed the vote in support of Amendment 2 on December 16, 1992. Thus, Amendment 2 will become effective as part of the Colorado Constitution on January 15, 1992.

A. THE DEFENDANTS

The defendant Roy Romer is Governor of the State of Colorado. Article IV, section 2 of the Colorado Constitution requires the governor to "take care that the laws be faithfully executed." The defendant Gale Norton is Attorney General of the State of Colorado. Section 24-31-101(1)(a), 10A C.R.S. (1988) requires the attorney general to "prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor." The defendant State of Colorado was created under the authority of the Enabling Act of March 3, 1875, and encompasses the branches, departments, agencies and political subdivisions subject to Amendment 2's proscriptions.

B. THE PROPONENTS OF AMENDMENT 2

Colorado for Family Values, a non-profit corporation based in Colorado Springs, drafted and promoted Amendment 2.[8] The National Legal Foundation, an organization founded by the Reverend Pat Robertson, assisted Colorado for Family Values in drafting the amendment. The National Legal Foundation believed that the clause prohibiting claims of discrimination was "the most crucial clause in the amendment." Letter dated June 13, 1991, released to the press in the fall of 1991. The National Legal Foundation, however, urged Colorado for Family Values to drop language referring to "special privileges" from the text of the amendment:

> If language denying special privileges to homosexuals is in the amendment, it could possibly allow homosexuals to argue that they are not asking for any special privileges, just those granted to everyone else. I believe that "No Special Privileges" is a good motto for the amendment's public campaign, but I fear the possible legal ramifications if it is included in the amendment itself.
>
> The language of the amendment should prohibit homosexuals from claiming any rights regarding employment, education, housing or status.

Id. According to the National Legal Foundation, the intended legal effect of the amendment was to deny gay men, lesbians and

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[8]A detailed description of the proponents of Amendment 2 is presented because of the plaintiffs' discussion of improper governmental purpose set out in part II C (5) below.

bisexuals "any rights regarding employment, education, housing or status." Id.[9]

The Colorado for Family Values' promotional material supporting the amendment characterized its effect as denying gays, lesbians and bisexuals the right to engage in pedophilia. STOP Special Class Status for Homosexuality, p. 2 ("Sexual molestation of children is a large part of many homosexuals' lifestyle--part of the very lifestyle 'gay rights' activists want government to give special class, ethnic status!"). The motto for Colorado for Family Values' campaign was "No Special Rights." Another Colorado for Family Values' publication, a position statement entitled "Special Gay Rights Legislation," argued that "authentic minorities should be wary" of supporting "special rights for gays."

In particular, Colorado for Family Values asserted that lesbians and gay men -- as society's "most persistent and change-resistant communicators of sexually transmitted diseases" -- endanger the public health. Position Statement at 9. The group

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[9]On August 9, 1991, the Legislative Council submitted a series of questions to Colorado for Family Values regarding Amendment 2. At a public hearing to address the questions, the Council inquired whether the amendment might violate the Fourteenth Amendment to the United States Constitution. The Legislative Council notes record Colorado for Family Values' reply as "No response." The Council also asked, "What is the interest of the state or people that is being furthered by this amendment?" The Legislative Council again recorded, "No response."

speculated that "by the mid-1990's, it will be difficult for sick persons to get hospital beds because of overcrowding by AIDS-infected homosexuals." Id. at 19. According to Colorado for Family Values, gays and lesbians "threaten ... to undermine traditional family values and structures." Id. at 32. Their statement asserted that "[h]omosexual 'marriages' will only erode traditional family structures, sap financial resources from legitimate, traditional families (by increasing disease-driven insurance rates, etc.) and cause measureless misery to helpless children, who would be the most wretched victims of such 'marriages.'" Id. at 33.

Colorado for Family Values' campaign for Amendment 2 is not the first effort in this country to legislate discrimination against gays, lesbians and bisexuals. The first campaign by the religious right[10] to repeal an anti-discrimination measure protecting gays and lesbians was led by Anita Bryant in Dade County, Florida, in the 1970's. Bryant promoted a successful referendum to repeal the Dade County Commissioners' prohibition of discrimination against gay men and lesbians in housing, public accommodation and employment. The repeal led to a boycott of the orange industry, for which Bryant was a major spokesperson.

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[10]Characteristics of the religious right include a belief that the Bible should be interpreted literally, opposition to a set of values labelled "secular humanism," and an evangelical commitment to convert and to limit the influence of Satan, liberalism, socialism, and communism.

By the early 1980's, the "New Right" political movement incorporated the religious right, creating a politically sophisticated national effort to organize around a group of related "moral" issues including anti-homosexuality, abortion, feminism, pornography, and prayer in the schools. The "New Right" cast the issues as a secular "defense of the family" rather than as questions of religious morality.[11] Building on the onset of the AIDS epidemic,[12] the Free Congress Foundation sponsored a book in 1987 entitled Gays, AIDS and You, by Michael Schwartz and Enrique Rueda, arguing that "the homosexual movement is nothing less than an attack on our traditional, pro-family values"[13] and that

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[11]Religious morality is a principal justification for discrimination and hostility toward gays and lesbians. Because several major religions condemn certain homosexual conduct, the religious right often maintains that laws prohibiting discrimination would require heterosexual individuals to violate their personal moral standards.

[12]The Human Immunodeficiency Virus ("HIV") was first discovered in 1983. Acquired Immune Deficiency Syndrome ("AIDS") is the term applied to the later stages of HIV infection. At least one million people in the United States are infected with HIV, and world-wide 12.9 million people are infected. Sexual behavior is central to the spread of HIV and AIDS, and in the early 1980's, the HIV epidemic was most often associated with gay and bisexual men. As of January 1992, an estimated 71% of HIV infection around the world was due to heterosexual behavior and 15% was due to homosexual behavior; the remainder was due to injecting drugs and other modes of transmission. The public health community believes that discrimination based upon sexual orientation hinders efforts to contain the spread of HIV.

[13]The approach developed by the "New Right" and the religious right to promote anti-homosexuality measures -- to cast the purpose of the measures as a "defense of family values" -- is akin to Hitler's appeals to traditional German family values:

"homosexuals should not be entitled to special treatment under the law."

National organizations, including Paul Weyrich's Free Congress Foundation, Beverly LeHaye's Concerned Women of America,[14] Jerry Falwell's Moral Majority, Robert G. Grant's Christian Voice, Phyllis Schlafly's Eagle Forum, Paul Cameron's Family Research Institute, Pat Robertson's Christian Coalition,[15] Louis Sheldon's Traditional Values Coalition,[16] and the Berean League, provided support for what appeared to be local, grass-roots efforts to defeat "homosexual privilege proposals."[17] At least two national religious right organizations are based in

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Kinder, Kirche, Kuche (children, church, kitchen). The Nazis' adoption of laws that permitted discrimination against homosexuals led to their exclusion from all phases of economic, social and cultural life, subjected them to indiscriminate violence and confiscation of their property, and allowed their arbitrary arrest, confinement in concentration camps, and death.

[14]Bert Nelson, the president of the Colorado chapter of Concerned Women of America, is a member of the Colorado for Family Values advisory board.

[15]Robertson founded the National Legal Foundation of Virginia Beach, Virginia. The National Legal Foundation provides the legal representation for Colorado for Family Values.

[16]One of the dominant themes of a conference that Sheldon convened in Washington D.C. in January 1990 was that homosexuals have been seeking "special protection over and above the equal rights already given to all Americans." Barbara Sheldon, chair of the Traditional Values Coalition of Colorado, is a member of the executive board of Colorado for Family Values.

[17]Nineteen states and more than 100 cities and counties have laws or executive orders protecting gay and lesbian rights.

Colorado Springs: Summit Ministries[18] and James Dobson's Focus on the Family.[19] Several Focus on the Family employees sit on Colorado for Family Values advisory boards.

C. THE PLAINTIFFS

The individual named plaintiffs -- with one exception -- are gay men and lesbians who reside in Denver, Boulder, Aspen, and Colorado Springs. The exception is Bret Tanberg, a heterosexual man who suffers from AIDS and is a resident of Weld County.

Plaintiff Richard G. Evans is the Director of the Office of Citizen Response for the City and County of Denver. He serves as liaison between the Mayor's Office and the gay and lesbian community. He worked on behalf of enactment of the Denver anti-discrimination ordinance and the Governor's issuance of an executive order prohibiting discrimination on the basis of sexual orientation in state employment. Evans believes that public

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[18]Summit Ministries of Manitou Springs is a thirty-year-old Christian Youth organization. David A. Noebel, the president of Summit Ministries, was a prominent preacher in Billy James Hargis' Christian Crusade and a member of The John Birch Society. Since 1977, Noebel has written anti-homosexual books and articles. Noebel is a member of the Colorado for Family Values advisory board.

[19]Focus on the Family moved from California to Colorado Springs in 1991. It employs 750 people. Since 1988, a division of Focus on the Family, the Family Research Council, has distributed a "homosexual packet" containing a document entitled "The Homosexual Agenda: Changing Your Community and Nation" with a chapter, "Starting an Initiative."

identification of oneself as gay or lesbian creates a more tolerant social and political atmosphere.

Plaintiff Angela Romero is a police officer employed by the City and County of Denver. When the fact that Romero was lesbian became general knowledge in the police department, Romero was demoted and other officers refused to respond to her calls for back-up assistance. Romero's subsequent protest to the chief of police, the Denver Manager of Safety, and the Colorado Civil Rights Division led to amendment of the Officer's Bill of Rights to include protection from discrimination based on sexual orientation.

Plaintiff Linda Fowler is employed in construction management in Denver. She has traveled with Mayor Webb in efforts to prevent the economic boycott caused by passage of Amendment 2. For years, Fowler has worked in the political arena to obtain legal protection for gays and lesbians, including enactment of the Denver anti-discrimination ordinance. She believes that as a lesbian she can either pretend to be that which she is not or she can work to create a society where her sexuality matters only to herself and to the people she cares about. Her continuing political efforts on behalf of the gay and lesbian community, since the passage of Amendment 2, subject her to harassment and physical danger.

Plaintiff Paul Brown worked for eleven years as a warehouse clerk for a private employer in Denver. After a member of an evangelical church became Brown's manager, Brown was transferred to the employer's accounting department, and shortly thereafter his job was abolished. In May 1991, Brown began work for the Colorado Department of Natural Resources. He applied for the job because in December 1990 Governor Romer had issued an executive order that prohibited discrimination in state employment on the basis of sexual orientation. Brown relies on the order to protect himself from negative employment evaluations for promotion based on his sexual orientation.

Plaintiff Priscilla Inkpen is an ordained minister in the United Church of Christ and a campus minister at the University of Colorado in Boulder. The United Church of Christ allows gays and lesbians to be ordained ministers. A lack of financial support for campus ministries may require Inkpen to seek new employment, and she fears that potential employers may discriminate against her on the basis of her sexual orientation. Inkpen owns a condominium, and she fears that neighboring condominium owners may harass her. Inkpen has a fifteen-year-old daughter who attends high school in Boulder. Her daughter has experienced several painful incidents at school involving cruel remarks about homosexuals.

Plaintiff Jane Doe lives in Denver and is professionally employed by a political subdivision of the state in a suburb of Denver. She is not "out" as a lesbian to her employer or co-workers. If Amendment 2 had failed, she probably would have come "out." The passage of Amendment 1 created budget difficulties for her government employer, and she fears that if she reveals her sexual orientation she will lose her job.

Plaintiff John Miller is the chair of the University of Colorado Faculty Council that represents four campuses and chair of the Colorado Springs campus Department of Language and Culture. His research and writing addresses gay writers and hispanic society. Since the adoption of Amendment 2, he has been reluctant to teach from materials that address gay or lesbian topics.[20]

The Faculty Council and the University of Colorado Students United requested the Board of Regents to include sexual orientation in the university's non-discrimination policy. The regents never voted on the proposal. When the proposal was presented to the regents, no gay or lesbian-identified faculty member from the Boulder or Denver campus would speak to the regents in support of a non-discrimination policy. Miller estimates that between 300 and 400 members of a faculty of 4000 are gay or lesbian.

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[20]Miller teaches an AIDS education class at the high schools. Two representatives from Focus on the Family monitor each AIDS education class that Miller teaches.

On the Colorado Springs campus, Miller knows 15 to 20 gay or lesbian members of a faculty of 250 to 300. Miller is one of two faculty members who is "out." He serves as a counselor and role model for gay students. Since Amendment 2 passed, the lesbian-identified faculty member and the president of the gay and lesbian student group have received harassing telephone calls, meeting announcements of the gay and lesbian student group routinely are torn from bulletin boards, and one of the original members of the student group committed suicide.

In 1988, the Colorado Springs Human Relations Council adopted a proposal by Miller and others to add a ban on discrimination on the basis of sexual orientation to the Colorado Springs city charter. The proposal was based on documented instances of discrimination in employment and housing. The city council, however, refused to receive the Human Relations Council's recommendation and reassigned its director to another job.

Many of the gay and lesbian plaintiffs knew that they were "different" from an early age. Most were embarrassed and confused about their sexuality. Fearing rejection by their families and peers, a number of them either avoided making any close friends or pretended to be someone they were not; the resulting

adolescent isolation led to depression and thoughts of suicide.[21] Most of the plaintiffs understood and affirmed their homosexual orientation to themselves by the time they reached age twenty, but several did not disclose their sexual orientation to others until recently. The gay and lesbian plaintiffs believe that open acknowledgment of their homosexuality is crucial for their own self-esteem and for creation of a more tolerant attitude toward others like themselves.

The common assumption today is that ten percent of the American population is gay. The reasons why a particular sexual orientation develops in any individual are complex.[22] Various

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[21]Gay youth are two to three times more likely to attempt suicide than other young people. They may comprise up to thirty percent of completed youth suicides annually. Report of the Secretary's Task Force on Youth Suicide, U.S. Department of Health & Human Services at 3-110 (January 1989).

[22]Sexual orientation is an enduring erotic, affectional or romantic attraction to individuals of a particular gender. See G. Herek, Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality 133, 134 (Summer 1991). The rubric of sexual orientation subsumes many different aspects of human sexuality. These include: (1) engaging in specific sexual behaviors or conduct with partners of a particular gender; (2) having a personal preference for or ongoing attraction to partners of a particular gender; (3) developing a private personal identity as gay, lesbian, heterosexual or bisexual; (4) establishing a public identity based on sexual orientation; and (5) identifying with a community defined by its sexual orientation. Id.

Sexual orientation is usually characterized as homosexual, a primary or exclusive attraction to individuals of a particular gender; heterosexual, a primary or exclusive attraction to individuals of the other gender; or bisexual, significant attractions to members of both genders. Id.

theories suggest genetic and prenatal hormonal factors, unconscious mental processes related to early childhood events or family relationships, learned associations between physiological arousal and external stimuli, reinforcement of sexual experiences with partners of a particular gender and subsequent applications of social labels to one's experiences, and bonding experiences with same-sex or other-sex peer groups in adolescence. Regardless of the origins or sexual orientation, sexual orientation is highly resistant to change.

American culture creates social and psychological pressure for males to affirm their masculinity through rejection of that which is not culturally defined as masculine (male homosexuality) and that which is perceived as negating the importance of males (lesbianism). There is a significant correlation between anti-gay attitudes and racism, anti-Semitism, anti-feminism, and authoritarianism. Anti-gay stereotypes -- shaped by historically-evolved cultural ideologies that justify the subjugation of minorities -- are also very resistant to change. Thus, although empirical evidence demonstrates that there is no correlation between sexual orientation and psychopathology or sexual orientation and pedophilia, there are widespread misperceptions

that homosexuality is a mental illness or that homosexuals are more likely than heterosexuals to molest children sexually.[23]

Another stereotype is the fear that contact with lesbians and gay men might influence a child to become homosexual. Empirical research, focusing on parents as the most powerful role models available to children, has found no evidence that children of gay parents differ from children raised in heterosexual households in development of gender identity or sexual orientation. An openly gay adult may serve as a positive role model, source of information, and trusted confidante for lesbian and gay youths who have been rejected by their parents and peers.

The individual plaintiffs will suffer irreparable injury if Amendment 2 takes effect. Plaintiff Romero will lose protection under Denver Police Department policies from employment discrim-

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[23]Sexual abuse of male children by adult men often is incorrectly referred to as "homosexual molestation," implying that the perpetrator is gay. The adjective "homosexual" refers to the victim's gender in relation to that of the perpetrator, not to the perpetrator's sexual orientation. Many child molesters have never developed the capacity for mature sexual relationships with other adults, either men or women. Colorado for Family Values' position statement quoted a conclusion by Paul Cameron, a Nebraska psychologist, that "those who are bi- to homosexual are proportionately much more apt to molest youth." Cameron assumed that all male-male molestations were committed by homosexuals; he apparently did not assess the perpetrators' sexual orientation. Cameron's research has been discredited by the American and Nebraska Psychological Associations and the American Sociological Association; his statements -- relied upon throughout the Colorado for Family Values position statement -- are aimed primarily at creating justifications for discrimination against lesbians and gay men.

ination on the basis of her sexual orientation. Plaintiff Brown will lose protection under defendant Romer's executive order from employment discrimination based on sexual orientation. Plaintiff Fowler will lose protection under Denver's anti-discrimination ordinance from employment discrimination based on sexual orientation, and all of the defendants who reside or are employed in Denver will lose protection under Denver's ordinance against discrimination on the basis of sexual orientation in educational institutions, real estate transactions, public accommodations and health and welfare services. Plaintiff Inkpen will lose protection under Boulder's ordinance against discrimination on the basis of sexual orientation in employment, housing, and public accommodations.

Plaintiffs Evans and Fowler were advocates for the adoption of the Denver ordinance. Plaintiff Romero was an advocate for the Denver Police Department policy. Plaintiff Miller was an advocate for an anti-discrimination policy at the University of Colorado and an anti-discrimination ordinance in Colorado Springs. Amendment 2 eliminates the avenues of political participation previously followed by Evans, Fowler, Romero, and Miller.

Finally, plaintiff Doe will be deterred from revealing her sexual orientation because of the passage of Amendment 2. She fears that she will lose her job if she reveals her sexual orien-

tation and that she will not have access to the courts to enforce a claim of discrimination.

II. ARGUMENT

A. SUMMARY OF ARGUMENT

In violation of the right to equal protection, Amendment 2 raises unique impediments to the governmental access of a selected class of Colorado citizens for no apparent legitimate reason. Amendment 2 not only repeals anti-discrimination ordinances in Denver, Aspen and Boulder, but further proscribes the enactment of any similar future legislation, thereby placing substantial burdens on Colorado's lesbian, gay and bisexual citizens who seek to participate in the political process and to secure the benefits of governmental action.

Amendment 2 targets Colorado's gay and lesbian community for official discrimination. Amendment 2 explicitly bars every branch of state and local government in Colorado from adopting, enacting or even enforcing any law that would ground a claim of discrimination based on "homosexual, lesbian or bisexual orientation." Although proponents focused public attention on allegedly "sinful" sexual practices, the fact is that Amendment 2 would permit discrimination based on homosexual or bisexual "relationships" or "orientation," however broadly defined. Amendment 2 radically alters the relationship between the State of Colorado and the gay, lesbian and bisexual communities within

it. By repealing anti-discrimination statutes already on the books in Denver, Boulder and Aspen, the amendment would authorize and endorse private discrimination against lesbians, gay men and bisexuals. By prohibiting state and local governments from enacting any law or policy that discourages discrimination against or encourages fair treatment of gays and lesbians, the amendment would impose upon these groups significant barriers that no other segment of the electorate faces. By encouraging discrimination against any person who publicly identifies him- or herself as gay or lesbian, or who dares to speak in favor of ending discrimination based on sexual orientation, the amendment would punish political speech which is clearly protected under the federal and state constitutions because of its power to change social attitudes and foster respect for difference in our society. In sum, the proponents of Amendment 2 seek to bestow governmental imprimatur on anti-gay prejudice and to remove discussion of such prejudice from public discourse.

Virtually identical initiatives were declared unconstitutional by the California Court of Appeal in Citizens for Responsible Behavior v. Superior Court, 1 Cal. App. 4th 1013, 2 Cal. Rptr. 2d 648 (1991), and by the California Superior Court in Jester v. City of Concord, No. C91-05455 (Cal. Super. Ct. Nov. 16, 1992) (granting plaintiffs' motion for summary judgment). See also Merrick v. Board of Higher Education, 1992 WL 328821

(116 Or. App. 258) (Nov. 12, 1992) (electorate's repeal of executive order banning discrimination based on sexual orientation found to violate Oregon's constitutional guarantee of free expression). Like the stricken initiatives, Amendment 2 violates the rights to equal protection and due process, and of free expression and association, guaranteed to all citizens by the state and federal constitutions.

B. THIS COURT SHOULD GRANT A PRELIMINARY INJUNCTION WHERE THE PLAINTIFFS HAVE A REASONABLE PROBABILITY OF PREVAILING ON THE MERITS AND THERE IS A DANGER THAT THEY WILL SUFFER IRREPARABLE INJURY.

The grant or denial of a preliminary injunction is a decision that lies within the sound discretion of the trial court. Rathke v. MacFarlane, 648 P.2d 648, 653 (Colo. 1982). In exercising its discretion, the trial court must find that the moving party has demonstrated:

> (1) a reasonable probability of success on the merits;
>
> (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
>
> (3) that there is no plain, speedy and adequate remedy at law;
>
> (4) that the granting of a preliminary injunction will not disserve the public interest;
>
> (5) that the balance of equities favors the injunction;
>
> (6) that the injunction will preserve the status quo pending a trial on the merits.

Id. at 653-54 (citations omitted).

The plaintiffs meet all of the requisites for preliminary relief. As the balance of this brief demonstrates, they have a reasonable probability of success on the merits. The plaintiffs and other gay people who live, work or travel in Colorado will be irreparably injured if Amendment 2 is enacted and enforced prior to a decision on the merits of this action.[24]

Initially, by violating constitutionally protected fundamental rights, Amendment 2 will cause irreparable injury as a matter of law. An alleged constitutional infringement alone will often constitute irreparable injury. Goldie's Bookstore v. Superior Court of the State of California, 739 F.2d 466, 472 (9th Cir. 1984), citing Wright & Miller, 11 Federal Practice and Procedure, section 2948 at 440 (1973). The loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976). The right to petition the government is a fundamental right within the protection of the First Amendment. Protect Our Mountain Environment, Inc. v. District Court, 677 P.2d 1361, 1365 (Colo. 1984); see also, Quaker Action Group v. Hickel, 421 F.2d 1111, 1116 (D.C.

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[24]The plaintiffs meet the other prerequisites for relief. The amendment is self-executing, and thus there is no plain, speedy, and adequate remedy at law to delay its enforcement. The public interest will be served if this court grants the requested relief in that Amendment 2 has created substantial public controversy. The balance of equities favors an injunction that will preserve the civil rights of gays, lesbians and bisexuals. And an injunction will preserve the status quo in that Amendment 2 would not be enforced pending a trial on the merits.

Cir., June 24, 1969) (deprivation of right to petition government for redress of grievances may constitute irreparable harm).

Amendment 2 will also cause irreparable injury as a matter of fact. Gay residents of Denver, Boulder and Aspen will lose the protections of existing anti-discrimination ordinances. Gays, lesbians and bisexuals will be denied the opportunity for equal political participation because unique burdens will prevent them from seeking governmental legislation, policies and determinations in their interest. Finally, the passage of Amendment 2 encouraged threats and actual instances of violence against Colorado's gay and lesbian communities. The enforcement of the amendment will leave them without remedies for acts of discrimination. Because the passage of the amendment has fostered an atmosphere of ignorance and hate, the First Amendment rights of gay men, lesbians and bisexuals, including the plaintiffs, will be chilled.

C. AMENDMENT 2 DENIES LESBIANS, GAY MEN AND BISEXUALS EQUAL PROTECTION OF THE LAW.

1. Although Amendment 2 Was An Initiated Constitutional Amendment, It Is Not Entitled to Special Deference Under the United States Constitution.

The United States Supreme Court struck down a popular initiative which, like Amendment 2, amended a state constitution to make it more difficult for an unpopular minority to enact legislation or policy that would protect it from discrimination. In

Reitman v. Mulkey, 387 U.S. 369 (1967), for example, the Court invalidated a California constitutional initiative designed to repeal and prevent future passage of state laws prohibiting racial discrimination in housing. The California electorate had approved a constitutional amendment that declared:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person as he, in his absolute discretion, chooses.

Unlike Amendment 2, the constitutional amendment involved in Reitman was silent regarding repeal of anti-discrimination statutes protecting particular groups. The United States Supreme Court, however, accepted the California court's conclusion that the amendment's "immediate design and intent" was "'to overturn state laws that bore on the right of private sellers and lessors to discriminate'" and "'to forestall future state action that might circumscribe this right.'" Id. at 374. As the California court recognized, adoption of the amendment established "'a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment should state action be involved.'" Id.

The initiative violated the federal constitution because, like Amendment 2, it went far beyond mere repeal of an anti-discrimination law. As the court put it,

> [The amendment] struck more deeply and more widely. Private discriminations in housing were not only free from [state anti-discrimination statutes] but they also enjoyed a far different status than was true before the passage of these statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

Id. at 376-77.

Similarly, those who would discriminate against gay, lesbian and bisexual people could now invoke the express constitutional authority of Amendment 2 to justify even the most invidious actions. Like the constitutional initiative struck down in Reitman, Amendment 2 would not only repeal existing anti-discrimination laws to the extent that they protect lesbians, gay men and bisexuals, but also create a constitutional right to discriminate in any manner against gay people, a right "embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government." The hostile and discriminatory purpose of Amendment 2 is plain on its face. See, e.g., Hunter v. Erickson, 393 U.S. 385, 390 (1968) (Supreme Court invalidated city charter amendment that prohibited passage of laws forbidding housing discrimination on basis of race, religion or ancestry except by initiative because any other type of housing law could be adopted through usual process).

The California Court of Appeal recently applied Reitman to invalidate a local initiative strikingly analogous to Amendment 2. In Citizens for Responsible Behavior v. Superior Court, 2 Cal. Rptr. 2d 648, 1 Cal.App.4th 1013 (1991), the court ruled unconstitutional a proposed initiative that, among other things, would have stripped a city council of authority, and required a majority vote of the electorate, to enact any law that banned discrimination on the basis of sexual orientation. The initiative repealed existing city ordinances protecting homosexuals and persons with AIDS from discrimination, replacing them with "an implicit affirmance of the right of all persons to discriminate against the affected classes." Id. at 657. Examining the initiative's plain language and its proponents' campaign literature, the court concluded that "the proposed ordinance is designed to encourage discrimination and promote bias against a selected class of citizens" in violation of equal protection guarantees. Id. at 658.

In reaching this result, the Citizens court relied on both Mulkey and Parr v. Municipal Court, 3 Cal. 3d 861 (1971). In Parr, the California Supreme Court overturned a facially neutral municipal ordinance limiting the use of public property because of the law's impermissible purpose to discriminate against an "undesirable" social group -- hippies. The California court reasoned that the equal protection clause serves to invalidate

discriminatory laws that are "expressions of hostility or antagonism to certain groups of individuals." Id. at 864. As the Parr Court explained:

> [W]e cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color.

3 Cal. 3d at 870 (emphasis added).

Amendment 2 is not entitled to special deference even though it was adopted by the voters. The United States Supreme Court rejected the argument that voter-enacted measures have special status in a case that arose out of a Colorado election thirty years ago. The court held that the fact that "a challenged legislative apportionment plan was approved by the electorate" did not have "federal constitutional significance." Lucas v. Colorado General Assembly, 377 U.S. 713, 737 (1964). Quoting West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943), the Lucas court explained

> 'one's right to life, liberty and property ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.' A citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be.

377 U.S. at 736-77.

2. Amendment 2 Is Not Neutral.

Amendment 2 is not "neutral." Had the measure banned all civil rights laws, the state might have been able to make a plausible claim to facial neutrality. Compare Reitman, 387 U.S. 369.[25] If Amendment 2 banned all laws prohibiting sexual orientation discrimination, the state might have been able to argue that if not neutral, the amendment at least was evenhanded. But see, Hunter, 393 U.S. at 390-91;[26] see also, Citizens, 1 Cal.App.4th at 1026. But Amendment 2 lacks even this half-hearted attempt at neutrality. The only people not entitled to help from the government against arbitrary discrimination are gay men, lesbians and bisexuals.[27]

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[25]The initiative at issue in Reitman banned all laws limiting the sale or rental of housing. Since the initiative repealed laws preventing discrimination on the basis of race in the sale or rental of housing, Reitman held that the initiative discriminated on the basis of race.

[26]A charter amendment that prohibited passage of laws forbidding housing discrimination on the basis of race, religion or ancestry did not distinguish between the races or religions. Nevertheless, the amendment was not neutral because it disadvantaged all those who would benefit from laws banning religious and racial discrimination.

[27]Amendment 2 only prohibits a "claim of discrimination" when made by a lesbian, gay man or bisexual; existing ordinances and policies remain in effect to redress claims of discrimination made by heterosexuals.

3. Amendment 2 Violates the Fundamental Rights of Lesbians, Gay Men and Bisexuals by Burdening Their Participation in the Political Process.

If a state restructures the political process evenhandedly, making it more difficult for anyone to seek a certain type of governmental action, courts generally will not interfere. Gordon v. Lance, 403 U.S. 1 (1971); see, Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 467-70 (1982). However, because the right to equal participation in the political process is essential to effective representative government, measures that restrict any identifiable group's ability to bring about change through the ordinary political processes are highly suspect under the Equal Protection Clause. Reynolds v. Sims, 377 U.S. 533, 565 (1964); see, Washington, 458 U.S. at 467-70; United States v. Carolene Products, 304 U.S. 144, 152, n. 4 (1938); see also, J. Madison, "Federalist No. 51," in Krammnick, ed., The Federalist Papers Penguin (1987).

To justify such measures, the state must show that they are necessary to achieve a compelling state interest. Kramer v. Union Free School Dist., 395 U.S. 621, 636 (1969). Employing this standard, the court has overturned measures limiting a group's ability to advance its interests by restricting the franchise, Hill v. Stone, 421 U.S. 289, 291, 297 (1975), by diluting the franchise, Reynolds, 377 U.S. 533, and like Amendment 2, by limiting a group's ability to protect some of its

interests by removing the power of legislative bodies to pass laws preventing discrimination against the group. Hunter, 393 U.S. at 390-92 (1969); see also, Reitman, 387 U.S. 369; Washington, 458 U.S. 457.

In Hunter, the Court invalidated a city charter amendment, adopted pursuant to a popular initiative, that repealed existing anti-discrimination legislation and further provided that the city council could implement no ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of the city's voters. Recognizing that "the reality is that the law's impact falls on the minority," the Court held that

> the State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group smaller representation than another of comparable size.

Id. at 393. Although the city could have adopted a system requiring that all of its legislative decisions be subjected to the vote of its citizens, having chosen "a more complex system" of governance, the city could not then discriminate against minorities who sought to use the established political process. Id. Thus, discriminatory hurdles imposed in the political process are subject to strict scrutiny and invalidation.

In Washington, 458 U.S. 457, the Supreme Court -- relying on the equal protection principles announced in Hunter -- overturned an initiative prohibiting mandatory busing to integrate the pub-

lic schools. The Court articulated the central principle in Hunter: laws structuring political institutions or allocating political power according to non-neutral principles that make it more difficult for certain minorities to achieve favorable legislation are as impermissible as denying such minority groups the vote. 458 U.S. at 470, 476. The Hunter charter amendment transferred the power to eliminate housing discrimination from the city council to the city electorate, and the Washington initiative removed the school district's authority to remedy de facto racial segregation and gave it to the voters of the entire state. The Washington initiative made a remedy less accessible for minorities, in violation of the Equal Protection Clause.

The California court in Citizens relied on Hunter to invalidate a local initiative that would have required a majority vote of the city electorate to enact any law that banned discrimination on the basis of sexual orientation. The court observed, "It is obvious that this provision raises obstacles in the path of persons seeking to have such ordinances enacted." Citizens, 2 Cal. Rptr. 2d at 655. The court noted:

> [A] more careful scrutiny is appropriate for any legislation which impinges upon a fundamental right. Arguably this ordinance attempts to restrict the right to petition the government which is secured to the people by the First Amendment . . . . This is so because the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance.

Id. at 655 n.9.[28]

Amendment 2 is similar to the Hunter, Washington and Citizens initiatives. Hunter, Reitman and Washington involved schemes that limited a group's ability to obtain protection from racial discrimination. Race, however, was not a factor in Kramer, Hill, or Reynolds; all involved classifications that in ordinary circumstances would not be suspect, but that were treated as suspect because they involved limits on the democratic process that disadvantaged an identifiable group.

Kramer, Hill, and Reynolds involved schemes that limited an identifiable group's ability to advance its interests by diluting the group's voting power or limiting its franchise. In Hunter, the court held that there was no constitutional difference between discriminating against a group by diluting its vote and discriminating by making it more difficult to enact protective legislation.

In Gordon v. Lance, 403 U.S. 1 (1971), the court held that the application of close scrutiny depends not on the scheme used to restructure the process, but on whether an identifiable group is disadvantaged by the scheme. As a result, strict scrutiny is required in this case not because the minorities at issue should

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[28]The court in Citizens did not review the initiative under the strict scrutiny test because the court could not find a rational basis for the initiative.

be recognized as suspect classes,[29] but because Amendment 2 creates classifications that impinge upon the fundamental right to participate equally in the political process.[30] See, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1015 (Colo. 1982) (where statutory classification affects fundamental right, "the state has the burden of establishing that the act is necessarily related to a compelling governmental interest").

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[29]No federal appellate court has ruled that classifications based on sexual orientation are entitled to strict scrutiny. However, in Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992), the Ninth Circuit invoked the "active" rational basis standard enunciated in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

Classifications based on homosexual orientation are inherently suspect and should be subject to strict scrutiny. See Watkins v. United States Army, 875 F.2d 699, 724-28 (9th Cir. 1989) (Norris, J., concurring); Jantz v. Muci, 759 F. Supp. 1543, 1551 (D. Kan. 1991), rev'd on other grounds, 976 F.2d 623 (10th Cir. 1992) (noting that three-judge panel could not overrule Rich v. Secretary of the Army, 735 F.2d 1220 (10th Cir. 1984) (petition for rehearing with suggestion for rehearing en banc pending). This Court need not reach the issue because strict scrutiny of discriminatory classifications that impinge upon fundamental rights is clearly required.

[30]The two branches of equal protection law are distinct. Rights considered "fundamental" for equal protection purposes include the right to interstate travel (burdened by residency requirements); the right to electoral participation, including the right to vote (burdened by various qualifications and obstacles); the right of access to the courts (burdened by fees); and the right of privacy (burdened by laws affecting rights to procreation and family). These rights do not bear a necessary relation to the suspect classes of race, national origin, alienage, legitimacy, or gender, but laws burdening fundamental rights nevertheless are subjected to strict scrutiny under equal protection analysis.

Amendment 2 places a substantial and unique burden on gay men, lesbians and bisexuals as they seek to participate in the political process. The Supreme Court has ruled that this method of reallocating political power is unconstitutional unless the state demonstrates a compelling governmental purpose. Thus, this Court should enjoin enforcement of Amendment 2 because here the state cannot demonstrate such a purpose.

4. The Purposes Behind Amendment 2 Do Not Provide Either a Rational Basis or a Compelling State Interest to Justify Its Enactment.

Far from being able to establish that Amendment 2 is supported by a compelling state interest, the state cannot even demonstrate that the amendment has a rational basis. At a minimum, equal protection requires that discrimination by the government be "rationally related to a legitimate governmental interest." United States Department of Agriculture v. Moreno, 413 U.S. 528, 533 (1973); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1991, cert. den. 61 U.S.L.W. 3418 (1992). The government must establish with evidence of record that the classification bears a rational relationship to a legitimate, nondiscriminatory purpose. Cleburne v. Cleburne Living Center, 473 U.S. 432, 446-47 (1985); Pruitt, 963 F.2d at 1165-66.

It is difficult to think of a rational reason for a policy banning discrimination against any group except lesbians, gay men and bisexuals. See Citizens, 1 Cal.App.4th at 1027. In any

case, here the state offers three state interests that bear no rational relationship to the act the state must justify: depriving all state and local governmental entities in Colorado of the power to remedy any claim of discrimination based on homosexual, lesbian or bisexual orientation.

The state claims that Amendment 2 is directed at "protecting the free exercise of religion." (Brief in Support of Defendants' Motion to Dismiss at 50) But the defendants do not say why free exercise must be shielded from civil rights laws that protect gay people but not from all other civil rights laws. The First Amendment already protects free exercise against potential future civil rights laws covering lesbians and gay men just as it protects free exercise against civil rights laws banning race and sex discrimination. See, e.g., Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985); Maguire v. Marquette University, 627 F. Supp. 1499 (E.D. Wis. 1986).

The state also claims that Amendment 2 "preserves citizens' associational rights from undue governmental interference" (Brief in Support of Motion to Dismiss at 50), apparently taking the position that civil rights laws limit the associational rights of groups who are told not to discriminate. Again, however, the state does not show that a governmental policy prohibiting discrimination against gays would threaten associational rights more than existing civil rights laws that apply to protected associa-

tional activities. See, e.g., Roberts v. United States Jaycees 468 U.S. 609 (1984). Moreover, the First and Fourteenth Amendments protect existing associational rights against undue interference. See, Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); N.A.A.C.P. v. Alabama, 357 U.S. 449, 460-62 (1958). The state further claims that Amendment 2 "avoids the dilution of existing civil rights programs by limiting special protections only to those characteristics upon which there is a national or statewide consensus." (Brief in Support of Motion To Dismiss at 50). Because Amendment 2 prohibits any policy of nondiscrimination for lesbians, gay men and bisexuals unless the voters repeal Amendment 2, the state must mean that Amendment 2 was aimed at requiring consensus in the form of voter approval. Consensus usually is expressed by the general assembly. But Amendment 2 does not say that all nondiscrimination policies must be supported by statewide consensus in the form of a popular vote. It says that laws and policies preventing discrimination against lesbians, gay men and bisexuals may not be adopted.

The state civil rights law, sections 24-34-401 et. seq., 10A C.R.S. (1988), was not passed by initiative and has not been subject to a popular referendum. Thus, there has been no demonstration that there is statewide consensus on providing nondiscrimination protection on the basis of race, creed, color, sex,

age, handicap, national origin or ancestry.[31] A policy of foregoing civil rights laws in the absence of popular consensus is not rationally related to a measure that says that the only kind of nondiscrimination law for which a "statewide consensus" is needed is a law banning discrimination against lesbians, gay men and bisexuals. The state must justify such selectivity. Pruitt, 963 F.2d at 1166.

Finally, the state claims that Amendment 2 is directed at "achieving statewide uniformity on this issue." (Brief in Support of Motion to Dismiss at 50) Again, as required by the equal protection doctrine, the state must provide a justification for treating lesbians, gay men and bisexuals differently from others. Pruitt, 963 F.2d at 1166. If the state means to say that the purpose of Amendment 2 is to achieve statewide uniformity on the issue of nondiscrimination generally, Amendment 2 bears no rational relation to it because it achieves uniformity only on policies that prevent discrimination against lesbians, gay men and bisexuals. If the state means to say that the purpose of Amendment 2 is to achieve statewide uniformity on the issue of discrimination against lesbians, gay men and bisexuals,

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[31]Colorado bans employment discrimination based on marital status even though there is not a similar provision of federal law. Compare section 24-34-402(h), 10A C.R.S. (1988) with 42 U.S.C. § 2000e et seq. The state does not say why a nationwide consensus is unnecessary to support a ban on marital status discrimination.

the state has simply described what Amendment 2 does rather than providing a neutral reason for the amendment.

The state argues that Bowers v. Hardwick, 478 U.S. 186 (1986), prevents the court from treating sexual orientation classifications as suspect. (Brief in Support of Motion to Dismiss at 50) Since the plaintiffs do not argue here that sexual orientation classifications are suspect, this argument is beside the point. Moreover, the decision in Bowers has no relevance to this case. The Court in Bowers sustained a state statute regulating homosexual sodomy against a challenge based on the Due Process Clause. The determination of whether a state has a right to prohibit or penalize specific forms of sexual expression is materially different from whether the government may burden certain people with respect to non-sexual activities because of their sexual identity.[32] The fact that there may be no fundamental right to engage in particular types of sexual conduct does not mean that the government may freely discriminate

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[32]Homosexuality, like heterosexuality, is not only a sexual orientation but an affectional and emotional orientation that transcends sex. G. Herek, Myths about Sexual Orientation, 1 Law & Sexuality at 134. See, e.g., Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (Norris J., concurring) (sexual orientation serves as a "central aspect of individual and group identity"); L. Tribe, American Constitutional Law ¶¶ 16-33 at 1616 (1988) (sexual orientation, whether homosexual or heterosexual, is central to the personal identity of individual).

in other respects against people because of their sexual identity. See Watkins, 875 F.2d at 716-20.

The court in Bowers addressed only the existence of a due process privacy right to engage in specific sexual conduct. 478 U.S. at 196 n.8. The court did not address any equal protection issues. See Pruitt, 943 F.2d at 995 n.5 (finding Bowers no barrier to "active" rational basis review of discrimination based on sexual orientation).

The Court's justification for permitting states to regulate sexual conduct in Bowers was not that the government or private citizens should be encouraged to discriminate against homosexual persons, but rather the Court's reluctance to create (or recognize) substantive rights not mentioned in the federal constitution or sanctioned by historical tradition. 106 S.Ct. at 2843-46. See C. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161 (1988). Bowers says nothing about whether the government can otherwise burden individuals who engage in certain forms of homosexual activity or who are identified as having homosexual "orientation." See Watkins, 875 F.2d at 718-19. Yet it is only these issues that this case presents.

Whatever justifications support laws regulating sexual conduct, it is clear that the government cannot enforce restrictions more broadly directed to, or based upon, an individual's sexual

orientation or identity. Such rules must be subjected to careful scrutiny not only because of the collateral fundamental rights that they may violate, but also because of the importance of sexual identity and the more attenuated justification for expanding governmental intrusion into matters of intimate sexuality divorced from particular conduct. It is difficult to imagine a subject more appropriate for careful scrutiny than governmental regulations involving issues of sexuality. The prevalence of strong emotions and religious and moral proscriptions against unorthodox sexual behavior render issues concerning sexuality particularly vulnerable to discriminatory laws and actions based on fear and prejudice rather than legitimate considerations of public welfare.

5. Amendment 2 Is Invalid Because It Was Passed For Purposes That Are Not Legitimate.

By saying that the purpose of Amendment 2 is to treat gay people differently, the state in effect has said that the purpose of Amendment 2 is illegitimate. The equal protection clause does not permit states to treat groups differently solely for the sake of different treatment. If it did, the equal protection guarantee would be meaningless. Cleburne, 473 U.S. at 447.

Mere "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Moreno, 413 U.S. at 534 (emphasis in original). Prejudice and fear are not legitimate purposes to justify government discrimination. See

Cleburne, 473 U.S. at 447 ("mere negative attitudes . . . are not permissible bases" for discriminating against the mentally retarded).

The Supreme Court and many lower courts have held that adverse government action against a particular group of people does not serve a legitimate government interest if it is premised on antipathy arising from prevailing fears of, prejudice toward, or stereotypes about the group's members.[33] Discrimination motivated by antipathy does not become legitimate simply because religious beliefs form the basis for the social disapproval.[34]

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[33]See, e.g., Palmore v. Sidotti, 466 U.S. 429, 433 (1984) ("[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); Bannum, Inc. v. City of Fort Lauderdale, 901 F.2d 989, 999 & n.30 (11th Cir. 1990) (vacating summary judgment and remanding for analysis of whether withdrawal of zoning approval for residential program for formerly incarcerated individuals was based on mere negative attitudes or fear); United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1224 (2d Cir. 1987) (governmental body may not escape liability for violation of equal protection where discriminatory action undertaken in response to racial animus of majority of citizens), cert. denied, 486 U.S. 1055 (1988); J.W. v. City of Tacoma, 720 F.2d 1126, 1129 (9th Cir. 1983) (invalidating application of zoning ordinance where legislative purpose based on "archaic and stereotypical notions" about the mentally ill); Burstyn v. City of Miami Beach, 663 F. Supp. 528, 537 (S.D. Fla. 1987) ("[w]here fear and prejudice [of elderly] are a motivating factor in passage of an ordinance, a violation of the equal protection clause results"); M.P. v. S.P., 169 N.J. Super. 425, 404 A.2d 1256, 1263 (App. Div. 1979) (upholding lesbian mother's right to custody of children despite the possibility of societal prejudice).

[34]See, e.g., Marks v. City of Chesapeake, 883 F.2d 308, 311 (4th Cir. 1989) (denial of permit to practice palmistry as "rituals" believed to be heretical not a legitimate purpose; officials cannot act solely "in reliance on public distaste for

As noted above, initiatives that could make far more plausible claims to official neutrality than the state can make for Amendment 2 have fallen because they were motivated by an illegitimate purpose. Reitman, 387 U.S. 369.

Like the thinly veiled objective of the city ordinance invalidated in Citizens, the hostile and discriminatory purpose of Amendment 2 is apparent from its proponents' campaign literature. For example, Colorado for Family Values equates homosexual orientation with murder, theft, fraud, necrophilia, bestiality and pedophilia. Position Statement at 7. The organization's statement declares that "it's common knowledge that homosexuals are notorious practitioners of sex with minors." Id. "Homosexual behavior," according to the statement, produces AIDS, a host of other infections and a parade of terribles that marches solely in Colorado for Family Values' overactive imagination. Id. at 9-19. Through factual distortions, the proponents of Amendment 2 sought to establish a purportedly neutral rationale for the measure's discriminatory effect that would mask their campaign of hatred.

The Court need look no further than Colorado for Family Values Position Statement to ascertain whether Amendment 2's

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certain activities"); Islamic Center of Mississippi v. City of Starkville, 840 F.2d 293, 302 (5th Cir. 1988) (neighbors' negative attitudes and fears not a permissible basis for distinguishing between familiar and unfamiliar religions).

proponents intended to encourage and support discrimination. The invectives directed at the lesbian and gay community make this purpose unmistakably clear. Amendment 2 is designed to promote bias against a selected class of citizens; it "has no other visible end." Citizens, 2 Cal. Rptr. 2d at 658.

D. AMENDMENT 2 VIOLATES THE FIRST AMENDMENT'S PROTECTION FOR EXPRESSIVE CONDUCT.

Amendment 2 violates the First Amendment to the United States Constitution because it substantially increases the risk for lesbians, gay men and bisexuals of engaging in expressive conduct. Amendment 2 disables every branch of state and local government from providing lesbians and gay men any protection from discrimination. Thus, the risk increases for gays and lesbians that engaging in any form of expressive activity will result in lost homes, jobs and other serious forms of retaliation. The state may not so amplify the perils of protected expression without compelling justification.

Any individual who advocates social change runs the risk that before the change occurs, the individual will suffer retaliation. See, e.g., Dorr v. First Kentucky National Corp., 41 F.E.P.Cas. 423 (6th Cir. 1986) (bank employee fired for being president of gay Christian organization); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971) (gay man not hired as librarian because of his activities in support of equality for lesbians and gay men).

Ordinarily, the First Amendment does not require that the government protect individuals facing retaliation by private persons because of expressive conduct. But see, Edwards v. South Carolina, 372 U.S. 229, 236-237 (1963) (state must act to protect demonstrators threatened with violence at hands of those who abhor their views). If the government, however, substantially increases the risk that an individual will experience private retaliation for protected expression, the First Amendment requires that the government demonstrate a compelling justification for exposing those who engage in expressive conduct to increased risk. N.A.A.C.P. v. Alabama ex rel Patterson 357 U.S. 449, 458-464 (1958).

In N.A.A.C.P., the state of Alabama sought to discover the membership list of the Alabama branch of the N.A.A.C.P. in an action brought against the N.A.A.C.P. for failure to register as a foreign corporation doing business in the state. The lists were sought, the state explained, as evidence that the N.A.A.C.P. was in fact doing intrastate business in Alabama and thus was required to register. The N.A.A.C.P. refused to produce the lists, claiming that if it did so it would expose its members to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility" and that such exposure was bound to discourage people from joining and participating in its activities. 357 U.S. at 452-54, 462-63.

Bates v. Little Rock, 361 U.S. 516 (1960), is similar. There, two Arkansas cities required that organizations operating within the cities provide membership lists as part of the cities' business tax. In both cities, the N.A.A.C.P. refused to turn over the lists, arguing that to do so would subject its members to harassment, threats of bodily harm and economic reprisals. In support of its position, the N.A.A.C.P. offered proof that public identification of members had lead to harassment and threats in the past. 361 U.S. at 517-21, 524.

In both cases, the state responded that any repressive effect that turning over the lists might have was of no First Amendment significance because the retaliation and threats would result from private not governmental action. N.A.A.C.P., 357 U.S. at 463; Bates, 361 U.S. at 524. The Supreme Court disagreed. Although it was true that the state was neither penalizing nor even discouraging N.A.A.C.P. membership in either case, it was the state which would make new retaliation and threats possible by demanding the lists. N.A.A.C.P., 357 U.S. at 463; Bates, 361 U.S. at 524. See, Brown v. Socialist Workers Party, 459 U.S. 87, 95-102 (1982) (First Amendment forbids forced disclosure of members, contributors or recipients of funds from minor, unpopular party, because of potential private and public retaliation).

Similarly, Amendment 2 forces the government to expose those who engage in expressive conduct to a substantially increased risk of retaliation. Prior to the passage of Amendment 2, lesbians, gay men and bisexuals who worked for equal rights took the risk of private retaliation balanced with the potential that government might prevent or provide redress for private retaliation. By sweeping every potential means of redress for private retaliation aside, Amendment 2 increases the risk of engaging in expressive activity for lesbians, gay men, bisexuals and those who support equal rights. Being gay and advocating equal rights in Colorado involves risks of economic and even physical retaliation.[35] Since Amendment 2 makes protection from discrimination impossible, the First Amendment demands a compelling justification here as well. See, Adolph Coors v. Wallace, 570 F. Supp. 202, 208-209, and 209, n.24 (N.D. Cal. 1983) (discovery of list of members of gay political association presented same First Amendment issue as N.A.A.C.P. and Bates).

The ultimate issue for this court, then, is whether the state has a "compelling" justification for preventing lesbians, gay men and bisexuals from obtaining redress in the form of non-

[35]Several of the plaintiffs have engaged in efforts to obtain legislation or policies protecting them from discrimination on the basis of sexual orientation. They fear that if they pursue further efforts they will suffer retaliation for exercising their First Amendment rights. Jane Doe fears that if she discloses her sexual orientation, she too will suffer retaliation.

discrimination policy from the executive, legislative or judicial branches of state and local government. N.A.A.C.P., 357 U.S. at 463; see, Hunter, 393 U.S. at 392-93.

This court should grant preliminary injunctive relief because there is virtually no possibility that the state can meet this burden. Neither the United States Supreme Court nor any other modern court has upheld the sweeping exclusion of one group from the possibility of obtaining protective policy at any level. Using a "constitutionally suspect" analysis similar to that used under the First Amendment, the Supreme Court twice has invalidated measures that limited the ability of a group to obtain redress. Reitman, 387 U.S. 369 (prohibition on any state agency from enacting housing discrimination policy invalid under equal protection clause); Hunter, 393 U.S. 385 (prohibition of legislation banning housing discrimination on the basis of race, religion and ancestry invalid under equal protection clause). Using much less exacting review than that required by the First Amendment, the Supreme Court has invalidated measures that place more limited restrictions on a group's ability to obtain redress. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax); Citizens, 1 Cal.App.4th 1013 (initiative prohibiting municipal legislation or policy preventing discrimination against lesbians, gay men and bisexuals violated minimal scrutiny equal protection analysis).

It is difficult to believe that the state will be able to argue that Amendment 2 serves any legitimate government purpose. The state must justify the decision to exclude from virtually the entire process by which public policy is made any consideration of whether lesbians, gay men and bisexuals should be protected from discrimination in any aspect of their lives. Legislation that restricts the political process, especially when aimed at a distinct group of citizens, is the most constitutionally suspect form of government action. See, Carolene Products, 304 U.S. at 152, fn. 4; Reynolds, 377 U.S. at 560, 562. The plaintiffs cannot conceive how lesbians, gay men and bisexuals represent so great a threat to the governmental process that the state is justified in excluding them from it.

The plaintiffs respectfully request the court to enjoin the defendants from enforcing Amendment 2.

Dated this ___ day of December 1992.

Respectfully submitted,

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The undersigned hereby certifies that true and correct copies of the foregoing brief in support of motion for preliminary injunction were placed in the United States Mail, first class postage prepaid, this 23rd day of December, 1992, addressed as follows:

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